

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
DORIS WARNER VIDOR )

Appearances:

For Appellant: Sydney Wetzler, Attorney at Law  
For Respondent: Burl D. Lack, Chief Counsel;  
Crawford H. Thomas, Associate Tax  
Counsel

O P I N I O N

This appeal is made pursuant to Section 19060 of the Revenue and Taxation Code (formerly Section 20 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in denying the claims of Doris Warner Vidor for refunds of personal income tax in the amounts of \$120.17 and \$820.92 for the years 1940 and 1941, respectively.

On April 28, 1939, Appellant declared herself trustee of 1,500 shares of preferred capital stock of Warner Bros. Pictures, Inc., for the benefit of her minor daughter, Linda Mervin Leroy. The trust instrument was silent as to the trustor's power of revocation. The shares of stock constituting the trust res were acquired from Appellant's father, H. M. Warner. It appears that Mr. Warner desired to transfer the shares of stock to his grand-daughter, Linda Leroy, in consideration of the sum of \$49,500. As Linda was an infant, Appellant agreed to advance the funds for the purchase of the stock. The trust instrument recites the fact of this advance and states that it is the desire of Appellant to hold the securities for the benefit of the designated beneficiary "and upon the trust hereinafter declared, subject to her right and claim for reimbursement for the sum of Forty-nine Thousand Five Hundred Dollars (\$49,500.00), with interest at three per cent (3%), so advanced for the purchase of said stock ..." The instrument was prepared and drafted by Mr. Warner's attorney in this State

and signed by Appellant in New York, Appellant was, however, a resident of California at the time, as apparently were all the other persons involved.

During the years 1940 and 1941, Section 2280 of the Civil Code read as follows:

"2280. 'Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee ..."

Section 12(g) of the Personal Income Tax Act (now -Section 18171 of the Revenue and Taxation Code) then provided:

"(g) Where the title to any part of the corpus of the trust may at any time re-vest in the grantor without the consent of any person having a substantial adverse interest in any part of the corpus or the income therefrom, and the re-vesting is not contingent upon the death of all the beneficiaries, then the income of such part of the trust shall be included in computing the net income of the grantor if the grantor is a resident ..."

The Commissioner contends that under Civil Code Section 2280 the trust was revocable by Appellant during the years involved and, consequently, the trust income was attributable to her under Section 12(g) of the taxing statute. The Appellant argues, however, that the trust was irrevocable regardless of the omission of a provision expressly reserving a power of revocation.

Appellant originally relied, in part, on Touli v. Santa Cruz County Title Co., 20 Cal. App. 2d 495, as authority for her contention that the trust was not a "Voluntary trust" under Section 2280. There, in holding that a deed of trust is not governed by Sections 2250 to 2289 of the Civil Code, which deal with trusts for the benefit of third persons, the court said that the expression "voluntary trust" was used in Section 2280 *in* "the restricted sense of a trust created freely and without a valuable consideration or legal obligation." She later recognized, however, that the trust must be construed in the light of Sections 2216 and

2217 of the Civil Code, which define voluntary and involuntary trusts as follows:

992216. A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another."

992217. An involuntary trust is one which is created by operation of law."

See Fernald v. Lawsten, 26 Cal. App. 2d 552; Title Insurance and Trust Company v. McGraw, '72 Cal. App. 2d 390.

In an effort to bring the trust within Section 2217 Appellant argues that she was legally obligated to create the trust because the shares of stock were issued to her subject to the condition that she execute the trust agreement, and that after the transfer was made she was under an obligation to establish this trust by operation of law. The transfer of the shares of stock and the execution of the trust instrument, however, constituted but one transaction (Title Insurance and Trust Company v. McGraw, supra), which Appellant entered into without compulsion. The express trust with which we are concerned was, accordingly, created by agreement and not by operation of law. It was the free act of Appellant and, in our opinion, the trust created was a voluntary one. Gaylord v. Commissioner of Internal Revenue, 153 F. 2d 408.

Whether a trust is to be revocable or irrevocable would appear to be a question of sufficient importance to merit consideration at the time of its creation. Since 1931 every "voluntary trust" created under the laws of this State, unless expressly made irrevocable by the trust instrument creating it, is revocable by virtue of Section 2280. The trust instrument involved in this appeal was carefully drawn, at Mr. Warner's direction, by an attorney experienced in trust matters. It would have been a simple matter to have placed the trust beyond the reach of Section 2280 by inserting a provision expressly making the trust irrevocable. There being no such provision in the instrument, however, we are unable to conclude on the basis of the evidence before us, that an irrevocable trust was intended. In any event, however, the intent of the parties is not decisive. Under Section 2280 the

trust, because not "expressly made irrevocable by the instrument creating" it, was revocable by Appellant, as trustor, during the years in question, even though the parties to the transaction may have intended to create an irrevocable trust. Fernald v. Lawsten, supra; Title Insurance and Trust Company v. M c G supra; Erik Krag, 8 T. C. 1091.

Appellant has also argued, without citing authorities, that the trust was executed in New York, and, consequently, is to be interpreted under the laws of that State. California, however, is both the domicile of the trustor and the situs of the trust. The trust instrument not containing a provision indicating a contrary intent, the law of this State applies. Bingen v. First Trust Co. of St. Paul, 103 F. 2d 260; Hu hes v. Commissioner of Internal Revenue, 104 F. 2d X & - -

#### O R D E R

Pursuant to the views of the Board on file in this proceeding and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in denying the claims of Doris Warner Vidor for refunds of personal income tax in the amounts of \$120.17 and \$820.90 for the years 1940 and 1941, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 24th day of July, 1952, by the State Board of Equalization.

J. L. Seawell, Chairman  
J. H. Quinn, Member  
Geo. R. Reilly, Member  
\_\_\_\_\_, Member  
\_\_\_\_\_, Member

ATTEST: Dixwell L. Pierce, Secretary